No. 86-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARKANSAS PUBLIC SERVICE COMMISSION; STATE OF ARKANSAS; ARKANSAS-MISSOURI CONGRESSIONAL DELEGATION; AND MISSOURI PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below, in affirming the Federal Energy Regulatory Commission ("FERC") decision to require a new division of electric generating capacity among the operating companies of a public utility holding company, and in finding that "FERC may lawfully assert jurisdiction over matters pertaining to generation where it is found that generation facilities are used as facilities for interstate wholesale sales" ignored or improperly construed the jurisdictional exclusion for generating facilities in Section 201 of the Federal Power Act, 16 U.S.C. § 824 (1982).

2. Whether the court below, in finding that the FERC possesses the authority to require a utility company to purchase a substantial portion of the output of an electric generating station where the company had agreed to purchase none, improperly precluded effective state regulation of generating facilities contrary to the provisions and intent of the Federal Power Act.

3. Whether the court below, in affirming the FERC decision, allowed utilities unilaterally to choose their regulatory forum contrary to the provisions and intent of the Federal Power Act, merely by altering their corporate structure and method of ownership in order to arrange for either federal regulation over purchases of the output of generating facilities or state regulation over ownership of generating facilities.

4. Whether the court below, in holding that the FERC had authority to force an electric company to purchase power from the generating units of an affiliate, based on the existence of a "contract affecting

rates," has improperly expanded FERC jurisdiction to include any contract that indirectly affects rates.

5. Whether the court below misinterpreted this Court's decision in *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986), by holding that *Nantahala* recognizes FERC jurisdiction to change the amount of generating capacity to be purchased by affiliated operating companies, where *Nantahala* did not involve the purchase or sale of generating facilities, over which FERC lacks jurisdiction.

6. Whether the FERC decision and the court's affirmance thereof, by finding that a required sale of generating capacity to a holding company subsidiary does not constitute a "forced purchase" has erred and has improperly created separate review standards for affiliates of holding companies and independent utilities, contrary to the Federal Power Act.

7. Whether the FERC's decision, and the court's affirmance thereof, that the reallocation of nuclear generating capacity among affiliated companies constitutes a jurisdictional "sale" is arbitrary, capricious and without substantial evidence in the record.

8. Whether the court below, in affirming the FERC decision, frustrated the congressional intent to preserve the independence of operating company subsidiaries of parent holding companies and state jurisdiction over utilities, contrary to the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* (1982).

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v.

FEDERAL ENERGY REGULATORY COMMISSION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Arkansas Public Service Commission ("APSC"); State of Arkansas, Arkansas-Missouri Congressional Delegation and Missouri Public Service Commission ("MoPSC") respectfully pray that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the District of Columbia Circuit entered on January 6, 1987, in *Mississippi Industries v. Federal Energy Regulatory Commission*, No. 85-1611 (D.C. Cir. Jan. 6, 1987)(*per curiam*).[1]

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[1] In addition to petitioners herein, the following entities were parties in the court below: Arkansas Attorney General; Arkansas

REFERENCE TO CASES BELOW

Mississippi Industries v. Federal Energy Regulatory Commission, No. 85-1611 (D.C. Cir. Jan. 6, 1987) (*per curiam*) ("*Mississippi Industries*"), the case below, has not yet been included in an official reporter. The administrative decisions which led to the case below are: *Middle South Energy, Inc., and Middle South Services, Inc.*, 31 FERC (CCH) ¶ 61,305 (1985); *Middle South Energy, Inc., and Middle South Services, Inc.*, 32 FERC (CCH) ¶ 61,425 (1985)(Opinion on Rehearing); *Middle South Services, Inc.*, ER82-483-000, 30 FERC (CCH) ¶ 63,030 (1985)(Initial Decision); *Middle South Energy, Inc.*, ER82-616-000, 26 FERC (CCH) ¶ 63,044 (1984)(Initial Decision). These decisions are set forth in their entirety in Appendices A-E.

JURISDICTION OF THIS COURT

The date of both the opinion below and the entry of judgment was January 6, 1987. No request for rehearing has been filed as of the date of this Petition for a Writ of Certiorari; however, the time for filing such a request has not yet expired. This Court has

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Power & Light Company; Associated Industries of Arkansas; Cities of Conway and West Memphis, Arkansas; City of New Orleans, Louisiana; Representative Webb Franklin; Georgia Gulf Corporation; Jefferson Parish, Louisiana; Louisiana Power & Light Company; Louisiana Public Service Commission; Middle South Energy, Inc.; Middle South Services, Inc.; Mississippi Attorney General; Mississippi Legal Services Coalition; Mississippi Power & Light Company; Mississippi Public Service Commission; New Orleans Public Service, Inc.; Occidental Chemical Corporation; Reynolds Metals Company; Riceland Foods; Union Carbide Corporation; and Weyerhaeuser Company.

jurisdiction to review the decision below by writ of certiorari pursuant to 28 U.S.C. § 1254 (1982).

STATUTES INVOLVED

This case involves Part II of the Federal Power Act, 16 U.S.C. §§ 824 *et seq.* (1982), which is set forth in its entirety, along with Part III of the Federal Power Act, 16 U.S.C. §§ 825 *et seq.* (1982), in Appendix F. It also involves the following portions of the Public Utility Holding Company Act ("PUHCA"): 15 U.S.C. §§ 79a, 79b, 79h, 79k (1982), which are set forth in their entirety in Appendix G.

STATEMENT OF THE CASE

The orders below result in the transfer of more than $3.5 billion of electric costs over the next ten years from consumers in Louisiana to consumers in Arkansas, Mississippi and Missouri. Arkansas, Mississippi and Missouri consumers are forced to pay this enormous amount as a result of FERC orders which exceed its authority under the Federal Power Act. These orders improperly force a utility to purchase the output of an affiliate's electric generating facility, and, in so doing, prevent state regulatory commissions from exercising their statutory functions.

Middle South Utilities, Inc. ("MSU"), is a public utility holding company with four operating subsidiaries,[2] a generating subsidiary,[3] and a service com-

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[2] Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light

pany.[4] In 1980, the Operating Committee of the MSU system recommended a plan for the allocation of Unit 1 of the Grand Gulf nuclear power plant ("Grand Gulf") which is owned by MSE. This plan was embodied in the Unit Power Sales Agreement ("UPSA") which was executed by all the operating companies on June 10, 1982. The UPSA provided for the following allocation of Grand Gulf's electric output:

	Grand Gulf Percentage	Megawatts[5]
AP&L:	0%	0
LP&L:	38.57%	433.9
MP&L:	31.63%	355.8
NOPSI:	29.80%	335.3

AP&L was a signatory to the UPSA but was obligated to purchase no electric capacity or energy from Grand Gulf pursuant to that agreement. In June 1982, MSE filed the UPSA with the FERC for its approval.

In April 1982, MSS filed a 1982 System Agreement with the FERC which governs transactions among the

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Company ("MP&L"), and New Orleans Public Service, Inc. ("NOPSI").

[3] The generating subsidiary was originally named Middle South Energy, Inc. ("MSE"), but has been renamed System Energy Resources, Inc. It shall be referred to "MSE" in this Petition for Writ of Certiorari.

[4] The service company, was originally named Middle South Services, Inc. ("MSS"), but has been renamed MSU System Services, Inc. It is responsible, among other things, for MSU system companies' filings before the FERC. It shall be referred to as "MSS" in this Petition for Writ of Certiorari.

[5] The term "megawatt" is a unit of measure of electric generating capacity equal to 1,000 kilowatts or 1,000,000 watts.

MSU operating companies and establishes rates for those transactions.

Proceedings relating to these two agreements were held before two separate FERC Administrative Law Judges. Although the FERC did not consolidate these cases, it issued a single decision on the merits of the two cases.

The most significant decision by the FERC below was to reallocate the responsibility to purchase electric capacity and energy from Grand Gulf as follows:

	Grand Gulf Percentage	Megawatts
AP&L:	36%	405
LP&L:	14%	158
MP&L:	33%	371
NOPSI:	17%	191

This reallocation was based upon a formula related to the nuclear capacity costs of each of the MSU operating companies. AP&L owns two nuclear power plants—ANO 1 and ANO 2—which it built comparatively inexpensively at a cost of $709 per kilowatt of plant generating capability. *See* 483 APSC Ex. No. 30, J.A. 3082.[6] The two plants were certificated by the APSC and were and are paid for by Arkansas consumers. MP&L built Grand Gulf, which was originally planned to be owned solely by MP&L and finally planned to be owned by MSE with its output sold to LP&L, MP&L and NOPSI. At the time of the

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[6] Exhibits and transcripts referenced are preceded by "483" because they are from Middle South Services, Inc., FERC Docket ER82-483-000. References to the joint appendix in the court below are abbreviated as "J.A.".

FERC hearing on the UPSA, the cost of Grand Gulf was estimated to be approximately $2,200 per kilowatt. *See* 26 FERC at 65,101, Appendix E at 396a. LP&L built and owns a nuclear power plant known as Waterford 3. At the time of the FERC hearing on the UPSA, the cost of Waterford 3 was estimated to be $1,900 per kW. *See id.*, Appendix E at 395a. However, unlike ANO 1 and ANO 2, which were constructed by AP&L, Grand Gulf and Waterford 3 were not constructed in a timely fashion and MP&L and LP&L experienced numerous cost overruns. *See Mississippi Industries*, slip op. at 14-15, Appendix A at 14a-15a.

Because the FERC reallocated cost responsibility for Grand Gulf based upon all nuclear capacity costs of the MSU system, it effectively used Grand Gulf as a surrogate in order to: (1) force AP&L to sell and the other MSU operating companies to purchase a portion of ANO 1 and ANO 2; (2) force AP&L to purchase a share of Grand Gulf and MP&L to purchase an increased share of Grand Gulf while forcing LP&L and NOPSI to sell a portion of Grand Gulf; and (3) force LP&L to sell and MP&L, AP&L and NOPSI to purchase a portion of Waterford 3.[7]

The APSC approved the construction of ANO 1 and ANO 2 in 1967 and 1970, as necessary for the needs of AP&L's consumers. *See* 483 APSC Ex. No. 2 at 13-14, 15-17, J.A. at 2909-10, 2911-13. The decisions of the FERC and the court below negated the earlier APSC decisions by sending the benefits of ANO 1

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[7] While no change in ownership resulted from the orders, the practical effect of the FERC's orders is a "purchase" and "sale".

and ANO 2 to entities outside AP&L's service territory and forcing AP&L ratepayers to bear the burden of the untimely construction and cost overruns of Waterford 3 and Grand Gulf.

Jurisdiction in the court below was timely invoked pursuant to section 313 of the Federal Power Act, 16 U.S.C. § 825*l* (1982). Parties petitioning for review of the FERC decision filed timely petitions for rehearing before the FERC pursuant to Section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l*(a) (1982).

REASONS FOR GRANTING THE WRIT

Mississippi Industries is a major case involving the transfer over the next ten years of more than $3.5 billion in power costs among electric consumers in four states. If this decision is allowed to stand, it will have a number of devastating effects on the utility industry and on regulation of that industry. First, the decision below rendered meaningless a major exception in the Federal Power Act to the jurisdiction of the FERC over generating facilities. Continued effective state regulation of generating facilities is possible only if this Court reverses the court below to give effect to the generating facilities exception. Second, the decision would allow utilities to choose their regulatory forum (FERC or state utility commissions) and to avoid substantial regulation of their generating facilities. Third, by recognizing FERC jurisdiction over any contract indirectly related to wholesale electric rates, the decision would result in a greatly expanded role of FERC over the management of utilities. Fourth, the decision would allow the FERC to act beyond its statutory authority and contrary to the PUHCA in regulating affiliates of holding companies.

Additionally, the jurisdictional issues present in the instant case must be resolved before this Court can decide the issues presented by petitions for writs of certiorari in three cases pending before this Court. Finally, this Court must clarify the scope of its ruling in *Nantahala* in this novel situation involving forced purchases of the output of generating facilities, which are exempt from FERC jurisdiction.

Generating Facilities Exemption

Mississippi Industries is the first case to address the important question of the scope of the exemption from FERC jurisdiction of generating facilities, an exemption clearly and specifically found in the Federal Power Act. The court below construed this exemption so as to deprive it of any force.

The Federal Power Act provides:

> The Commission. . .shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy. . . .

16 U.S.C. § 824(b)(1) (1982). The affirmative grant of jurisdiction to the FERC is found in section 201(b)(1) of the Act which provides "[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and. . .the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1) (1982).

This specific proscription of FERC jurisdiction over generating facilities has previously been recognized by this Court in rather direct fashion, where, in interpreting section 201 of the Federal Power Act, this Court stated:

> It is hard for us to believe that Congress meant us to read "shall have jurisdiction" where it had carefully written "but shall not have jurisdiction." The command "thou shalt not" is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense.

Connecticut Light and Power Co. v. FPC, 324 U.S. 515, 528-29 (1945). The Federal Power Act does not vest in the FERC the jurisdiction to reallocate responsibility for generating facilities among operating companies of a holding company.

Despite the clear language of the Act and this Court's previous decision, the court below found FERC jurisdiction to reallocate capacity entitlements to a generating facility stating:

> [T]he Court accepts the proposition that FERC may lawfully assert jurisdiction over matters pertaining to generation where it is found that generation facilities are used as facilities for interstate wholesale sales.

Mississippi Industries, slip op. at 42-43, Appendix A at 42a-43a.

The purported limitation in the court's holding to "facilities for interstate wholesale sales" is no limitation at all. Almost the entire nation is electrically interconnected, and electricity flows freely in interstate commerce. Further, any sale regulated by FERC is a "wholesale sale." The purported limitation, therefore, is illusory. The result of the decision of the court below, if left undisturbed, would be to extend FERC jurisdiction to every major generating facility in the

nation despite the Federal Power Act's clear proscription of FERC jurisdiction over generating facilities. The writ of certiorari should be issued to review this error.[8]

Impact on Regulatory Authority

This improper expansion of FERC jurisdiction severely and directly intrudes on the jurisdiction of state regulatory commissions, including the petitioners, APSC and MoPSC. The APSC and the MoPSC have, and exercise, considerable regulatory authority over AP&L, the MSU operating company located in Arkansas and Missouri.[9]

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[8] To justify the expansion of FERC jurisdiction to generating facilities, the court below also found that the FERC has jurisdiction to alter the UPSA, because the UPSA is a "contract affecting rates." *See Mississippi Industries*, slip op. at 32-39, Appendix A at 32a-39a. The UPSA "affects" rates because a shift in the entitlement shares of Grand Gulf would increase or decrease the rates of the utility possessing such entitlement. This argument, however, proves too much. Pursuant to the same reasoning, the FERC would have to review and approve or alter management decisions on contracts with labor, the purchase of trucks, the purchase of computers or the purchase of office equipment, all of which "affect" rates.

Very simply, the jurisdiction of the FERC does not extend that far. Contracts directly affecting rates must be filed and approved by the FERC. Contracts indirectly affecting rates need not be so filed and approved. The FERC does not have jurisdiction to monitor and regulate day to day operations of a utility. However, the court below would invest the FERC with such jurisdiction.

[9] APSC and MoPSC have the duty to assure that the retail rates of AP&L are just and reasonable. In addition, public utilities in Arkansas, including AP&L, are required to apply to the APSC for approval of other operations, including construction of generating facilities, pursuant to Ark. Stat. Ann. § 73-276

The APSC has been given the authority and duty to review actions by utilities before they are taken. The APSC and MoPSC have both been given authority to determine the need for such actions and the reasonableness of the methods proposed to achieve such actions, and to review the result of those actions to ensure that the costs actually incurred in achieving those results were reasonable. These interdependent facets of APSC and MoPSC authority permit these regulatory agencies to carry out their statutory authority to assure Arkansas and Missouri ratepayers that electric rates are just, reasonable, and nondiscriminatory.

On the other hand, the FERC does not make the prior examination of the need for construction of additional generating facilities. FERC has traditionally and properly limited its examinations to determining the proper rates for wholesale sales once a facility is commercially operable.

In a single decision, the FERC and the court below have eliminated the effectiveness of past and future

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through 73-276.18 (1979) (codifying Act 164 of 1973, as amended); issuance of stocks, bonds or other evidences of indebtedness or creation of liens against utility property in Arkansas, pursuant to Ark. Stat. Ann. §§ 73-254 and 73-255 (1979); and the purchase, sale, lease, or rent of any utility property constituting an operating system or unit, pursuant to Ark. Stat. Ann. § 73-253 (1979). Similarly, in Missouri, the MoPSC may, in ordinary circumstances, exert authority over the construction or operation of plants in Missouri through its authority to approve all issuances of stock, bonds, notes or other evidences of indebtedness payable at periods of more than twelve months; and approve any sale, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation of all or any part of its franchise, works or system. *See* Mo. Rev. Stat. §§ 393.170, 393.200, 393.190 (1978).

regulation by the APSC and MoPSC of new generating facilities and appropriate rates for AP&L. The APSC approved the construction of ANO 1 and ANO 2 because such facilities were needed for Arkansas consumers. Now, the FERC and the court below have undermined that determination and removed low cost facilities from AP&L by forcing a sale from those facilities to consumers in Louisiana and Mississippi. The APSC and MoPSC have traditionally examined the expenses and rate base items of AP&L to assure Arkansas and Missouri consumers of just and reasonable rates. Now, the FERC and the court below have determined that the costs of two major and expensive nuclear powerplants—Grand Gulf and Waterford 3—must be charged as expenses to AP&L and its retail consumers. Neither the APSC nor the MoPSC has the ability to supervise, under its own auspices, the prudence of planning, construction or operation of these two out-of-state plants constructed by entities which are not jurisdictional to the APSC or MoPSC. Even AP&L, on which FERC and the court below have thrust a share of Grand Gulf and Waterford 3, lacks the ability to supervise the prudence and economy of those plants since those plants are not located in the AP&L service territory and were constructed by other corporate entities.

By this action the FERC has insured that no regulatory body will effectively review the need for the construction of electric generating facilities. The state regulatory commissions will be forced to adopt the posture of the FERC, and regulation will be reduced solely to the determination of the appropriate rates for power from a facility, the need for which has never been reviewed.

The decision of the court below violates the delicate but cognizable line which demarcates federal from state regulatory jurisdiction. By reallocating the costs of generating facilities among consumers in different states, the FERC and the court below have made meaningless any state assertion of jurisdiction over review of the prudence of construction of or purchase of generating capacity when that construction or purchase is in the context of a unit power sales agreement. Rather, in such circumstances, the court denigrates the role of the state utility commissions to that of litigants—with the right to intervene before the FERC—from that of regulators.

Regulatory Gap

The decision below, when read in concurrence with *Nantahala, supra*, results in a regulatory gap whereby there is no regulatory oversight of the prudence of purchases of generating capacity in a holding company situation.

The FERC has consistently declined to regulate the prudence of power purchases except in one, very limited situation which is not apposite here.[10] Since, un-

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[10] The FERC will review the prudence of a power purchase insofar as the purchase is an expense item in a wholesale selling company's rates. *See* Southern Company Services, Inc., 28 FERC (CCH) ¶ 61,349 (1984); Pacific Power & Light Co., 27 FERC (CCH) ¶ 61,080 at 61,148 (1984); Pennsylvania Power & Light Co., 23 FERC (CCH) ¶ 61,325 at 61,716 (1983). The FERC will not examine the prudence of purchase in a sale from a generating subsidiary to other members of a holding company. Rather, its examination of prudence of purchase has been only in a non-affiliate situation.

der the FERC's reading of *Nantahala*,[11] a FERC approved rate must be recognized by a state utility commission in fixing retail rates. *Mississippi Industries* combined with *Nantahala* essentially prevents a state from regulating prudence of purchase. Since FERC fails to scrutinize the prudence of the purchasing utility in entering into the affiliate transaction, a utility will totally avoid regulation of that transaction by entering into a unit power sales agreement rather than buying a portion of a generating unit. In *Southern Company Services, Inc.*, 26 FERC (CCH) ¶ 61,360 (1984), the FERC held:

> [T]he Commission is not empowered to disapprove or modify a power sales agreement on the grounds that the buyer may not be making the best possible deal. . . .[T]he question of the prudence of a utility's power purchases is properly an issue in the buying utility's rate case where it seeks to pass the costs of its purchased power on to its ratepayers.

26 FERC at 61,795 (footnote omitted). *See also Southern Company Services, Inc.*, 28 FERC (CCH) ¶ 61,349 at 61,636 (1984); *Philadelphia Electric Co.*, 15 FERC (CCH) ¶ 61,264 at 61,601 (1981). However, since FERC has ordered a specific allocation of Grand Gulf, *Nantahala, supra*, arguably precludes state commission review of the prudence of an affiliate's purchase of Grand Gulf.

Equally disturbing as the potential existence of the regulatory gap is the ability of utilities in a utility

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[11] *See* Kentucky Power Company, 36 FERC (CCH) ¶ 61,227 at 61,554 (1986).

holding company to create and take advantage of the regulatory gap. If a utility such as AP&L purchases an undivided share in a jointly owned generating station, APSC approval must be sought and received by AP&L before it could effect the transaction. *See* Ark. Stat. Ann. § 73-276 through 73-276.18 (1979). However, should AP&L effect the transaction through a unit purchase from a generating subsidiary of the holding company, such as MSE, the APSC has no jurisdiction to regulate the purchase since the purchase was made pursuant to a FERC-authorized rate and, in the instant case, a FERC-mandated allocation scheme. Under the decision below, the APSC is precluded from regulating the transaction, and FERC will not review the prudence of purchase. The utility can determine the level of regulatory scrutiny it will receive by its choice of corporate makeup and contractual format.

The requested writ should issue to review the appropriateness of this regulatory gap.

Pending Petitions for Writs of Certiorari

Petitions for writs of certiorari are currently pending before this Court in three cases which deal with the interrelationship between state and federal regulation of electric utilities. The jurisdictional issues posited by the instant case must be resolved before the merits of any of these three cases can be reached.

Commonwealth Electric Co. v. Department of Public Utilities of the Commonwealth of Massachusetts, 397 Mass. 361, 491 N.E.2d 1035 (1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 18, 1986)(No. 86-61), seeks review of a decision of the Massachusetts Supreme Judicial Court affirming a decision of the

Massachusetts Department of Public Utilities requiring Commonwealth Electric Company to refund certain costs incurred during outages of a nuclear plant due to the imprudence of the nominal owner of that plant. Commonwealth Electric, which does not have title to any portion of the plant, has a contract to pay for and receive 11% of the output of the plant. Such contracts have been found to amount to beneficial ownership of a plant even though title does not pass. *See Otter Tail Power Co. v. FPC*, 473 F.2d 1253 (8th Cir. 1973). Commonwealth Electric seeks a writ of certiorari based in large part on its contention that the FERC has exclusive jurisdiction over the "wholesale sale" of generating capacity and that the state commission may not interfere with a rate filed with the FERC.

Before this Court can decide the issues presented by *Commonwealth Electric*, it must decide whether the FERC or the state commission has jurisdiction over generating facilities. If the FERC lacks jurisdiction, it necessarily follows that the state could not have interfered with federal jurisdiction.

Similarly, two cases dealing with abstention have a threshold issue regarding FERC jurisdiction over generating facilities. *New Orleans Public Service, Inc. v. City of New Orleans* ("*NOPSI v. New Orleans*"), No. 85-3398 (E.D. La. Sept. 16, 1985), *aff'd in part*, 782 F.2d 1236, *modified*, 798 F.2d 858 (5th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3295 (U.S. Oct. 3, 1986) (No. 86-546), relates to the very case at issue in the instant Petition for a Writ of Certiorari. There, NOPSI complained that the New Orleans City Council, regulator of NOPSI retail rates, refused to recognize in retail rates the FERC-imposed cost of Grand

Gulf power. *See NOPSI v. New Orleans*, No. 85-3398, slip op. at 3-4. When NOPSI sought an injunction to force such recognition, the district court dismissed the action based upon the Johnson Act, 28 U.S.C. § 1342 (1982), and abstained from considering the action. *See NOPSI v. New Orleans*, No. 85-3398, slip op. at 2. Although the Fifth Circuit reversed the district court's dismissal on the basis of the Johnson Act,[12] it affirmed the district court's discretion to abstain. *See NOPSI v. New Orleans*, 798 F.2d at 860. NOPSI claims that the district court may not abstain in such a situation. Before deciding whether a court may abstain where there is a conflict between federal and state regulation, this Court must first decide whether such a conflict exists. If, as asserted by petitioners herein, the FERC has no jurisdiction to reallocate Grand Gulf power, there is no federal jurisdiction over the subject matter at issue in *NOPSI v. New Orleans*, and, therefore, no conflict.

American Electric Power Company, Inc. v. Kentucky Public Service Commission, 787 F.2d 588 (6th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. Sept. 2, 1986)(No. 86-49) also challenges the abstention by a federal court from deciding challenges to a state utility commission order where the company claimed that the FERC had exclusive jurisdiction. There, the Kentucky Public Service Commission rejected, on the basis of lack of need, a request by Kentucky Power Company to purchase a 15% ownership share of a generating plant owned by an affiliated generating subsidiary of a public utility holding company. In response, Kentucky Power entered into

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[12] *See* NOPSI v. New Orleans, 782 F.2d at 1242-43.

a unit power sale agreement to purchase 15% of the output of that plant, thus attempting to transfer jurisdiction from the state commission to the FERC. When the Kentucky Public Service Commission found it to be imprudent for Kentucky Power to purchase 15% of the output of that plant, Kentucky Power sought to enjoin the Kentucky Public Service Commission's order. The federal court abstained, and the court of appeals upheld the abstention. Kentucky Power petitioned this Court for a writ of certiorari, which is currently pending. Again, if the FERC lacks jurisdiction to alter a contract for the sale of the output of a generating facility, there is no conflict between state and federal jurisdiction.

Thus, the threshold issue in three major pending petitions for writs of certiorari is the jurisdiction of FERC to regulate generating facilities. The grant of the writ requested here and a decision on the merits of this case would aid in the resolution of those three proceedings.

Scope of Nantahala

In holding that the FERC had jurisdiction to alter the terms of the UPSA, the court below relied on *Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986). That case dealt with a state commission's refusal to adopt the FERC's determination of the proper allocation of a purchased power agreement between two affiliated power companies. A purchased power agreement, which is not related to any specific generating unit, differs substantially from a unit power sales agreement pursuant to which a utility purchases the output of a specific generating unit. The specific exemption from the Federal Power Act

for generating facilities precludes FERC jurisdiction to alter a unit power sales agreement.

In *Nantahala*, this Court did not address the underlying question of whether the FERC has authority to alter either a purchased power agreement or a unit power sales agreement. However, the court in *Mississippi Industries* interpreted the decision to extend to FERC jurisdiction over unit power sale agreements. In order to clarify the more limited scope of this Court's ruling in *Nantahala*, the writ of certiorari should be issued.

Forced Purchase

Both the FERC and the court below rejected arguments that the required sale of Grand Gulf capacity to AP&L and MP&L were forced purchases, beyond the authority of the FERC. They based their opinions on the fact that MSU, a holding company, is an "integrated system." At the same time, the court below suggested that the FERC order would have been a forced purchase if it had related to unaffiliated companies:

> The Commission suggests upon reconsideration that its authority is unchanged whether "the central issue is viewed as one of cost allocation or as 'forced' purchases." 32 FERC ¶ 61,425 at 61,949. We do not interpret this comment as an assertion by FERC that it may, under any circumstances, force a purchase among nonaffiliates.

Mississippi Industries, slip op. at 44, n.75, Appendix A at 44a, n.75. Thus, the FERC has created two standards: a forced purchase may be effected among holding company affiliates, but not among independ-

ent utilities. The Federal Power Act allows the FERC to regulate "sales" in interstate commerce but is silent concerning its ability to regulate "purchases." It does not differentiate between holding company affiliates and independent utilities. Thus, the FERC lacks authority to order either a holding company affiliate or an independent company to purchase capacity from a generating facility.

Despite this fact, the FERC ordered AP&L to purchase 36% of the output of Grand Gulf, claiming that its order did not constitute a forced purchase even though the FERC asserted jurisdiction over the transaction as a sale (necessarily implying a purchase) and AP&L had not agreed to purchase any portion of the output of Grand Gulf.

Establishment of different standards for holding company affiliates and unaffiliated utilities is not permitted by the Federal Power Act. The writ of certiorari should be issued to review this expansion of FERC authority.

FERC Conclusion that the Reallocation of Nuclear Generating Capacity Constituted a "Sale"

The court below affirmed the FERC decision that it has the authority to order AP&L to purchase a portion of Grand Gulf based in part on its finding that the transaction was not a "forced purchase." *See Mississippi Industries*, slip op. at 43-47, Appendix A at 43a-47a. The FERC decision must rest on the conclusion that the purchase was not "forced" or that a "purchase" did not occur. The FERC could not reasonably conclude that the AP&L purchase was not "forced," since AP&L vigorously fought the purchase throughout the proceeding below. Therefore, it could

only reach its decision by concluding that the transaction was not a "purchase" and, concomitantly, that no "sale" occurred. However, a sale is a prerequisite for FERC jurisdiction over this transaction.

FERC cannot have it both ways. Either the affiliates are so closely related that no sale occurred, and therefore FERC jurisdiction does not attach, or, in the alternative, FERC's order which forced AP&L to purchase Grand Gulf power violates its own "no forced purchases" rule. Therefore, FERC's decision that it has jurisdiction over the transaction and that there was no forced purchase and sale is both arbitrary and capricious and without substantial evidence in the record. The writ of certiorari should be issued to determine whether the FERC has jurisdiction where no sale occurs.

FERC Interference with State Regulatory Authority, Contrary to the Public Utility Holding Company Act

A principal purpose of PUHCA was to prevent the manipulation of subsidiary operating utilities by parent holding companies, which is detrimental to the consumers of the subsidiary operating utilities. *See* 15 U.S.C. § 79a(b) (1982). PUHCA was specifically designed to prevent holding companies from operating as monolithic utilities beyond effective control of state regulatory agencies by requiring recognition of the independent existence of the subsidiary operating utilities, to the end that each would be subject to regulation by the states. *See* 15 U.S.C. § 79k (1982).

By reallocating nuclear capacity among the MSU operating companies, the FERC has commingled the separate identities of the MSU operating companies and prevented effective state regulation of those com-

panies. PUHCA was designed to prevent this loss of state regulatory authority. The writ of certiorari should issue to determine whether the order below violates the PUHCA.

CONCLUSION

For these reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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